

FISHER WAYLAND COOPER LEADER & ZARAGOZA L.L.P.  
2001 PENNSYLVANIA AVENUE, N.W.  
SUITE 400  
WASHINGTON, D.C. 20006-1851  
TELEPHONE (202) 659-3494

RICHARD R. ZARAGOZA  
(202) 775-5660

December 15, 1998

FACSIMILE  
(202) 296-6518

INTERNET  
rzaragoza@fwclz.com

WEBSITE  
<http://www.fwclz.com>

**VIA COURIER**

Magalie Roman Salas  
Office of the Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, DC 20554

RECEIVED  
DEC 15 1998  
FEDERAL COMMUNICATIONS COMMISSION

**Re: Satellite Delivery of Network Signals  
To Unserved Households for Purposes  
of the Satellite Home Viewer Act**

**CS Docket No. 98-201  
RM No. 9335  
RM No. 9345**

Dear Ms. Salas:

Submitted herewith, on behalf of The Named State Broadcasters Associations, is a copy of the date stamped "Receipt Copy", along with eight copies, of its Comments filed on December 11, 1998 in the above-captioned rulemaking. The original and requisite copies of the Comments were timely filed with the Secretary's Office at 1919 M Street rather than at the above-referenced address. We apologize for this inadvertent error.

If there are any questions regarding this matter, please contact the undersigned.

Very truly yours,

  
Richard R. Zaragoza

RRZ:srf

Enclosure

cc: Don Fowler (w/diskette)  
International Transcription Service, Inc. (w/diskette)

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BEFORE THE  
**Federal Communications Commission**

WASHINGTON, D.C.

**RECEIVED**

DEC 11 1998

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Satellite Delivery of Network Signals	)	CS Docket No. 98-201
to Unserved Households for	)	RM No. 9335
Purposes of the Satellite Home	)	RM No. 9345
Viewer Act	)	

Part 73 Definition and Measurement  
of Signals of Grade B Intensity

To: The Commission

**JOINT COMMENTS OF THE  
NAMED STATE BROADCASTERS ASSOCIATIONS**

The Alabama Broadcasters Association, Arizona Broadcasters Association, California Broadcasters Association, Connecticut Broadcasters Association, Florida Association of Broadcasters, Georgia Association of Broadcasters, Idaho State Broadcasters Association, Illinois Broadcasters Association, Indiana Broadcasters Association, Iowa Broadcasters Association, Kansas Association of Broadcasters, Kentucky Broadcasters Association, Louisiana Association of Broadcasters, Maine Association of Broadcasters, Maryland/DC/Delaware Broadcasters Association, Massachusetts Broadcasters Association, Michigan Association of Broadcasters, Minnesota Broadcasters Association, Mississippi Association of Broadcasters, Missouri Broadcasters Association, Montana Broadcasters Association, Nebraska Broadcasters Association, Nevada Broadcasters Association, New Hampshire Association of Broadcasters,

New York State Broadcasters Association, North Dakota Broadcasters Association, Ohio Association of Broadcasters, Oklahoma Association of Broadcasters, Oregon Association of Broadcasters, Pennsylvania Association of Broadcasters, South Carolina Broadcasters Association, South Dakota Broadcasters Association, Tennessee Association of Broadcasters, Texas Association of Broadcasters, Utah Broadcasters Association, Vermont Association of Broadcasters, Washington State Association of Broadcasters, Wisconsin Broadcasters Association and Wyoming Association of Broadcasters (collectively, the "Associations"), by their attorneys and pursuant to Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415, 1.419, hereby jointly submit their comments in response to the Commission's Notice of Proposed Rule Making ("NPRM")<sup>1/</sup> in the above-captioned proceeding.

## I. INTRODUCTION

1. The Associations appreciate the opportunity to provide their views on the issue of whether the Commission should modify its rules concerning the definition and measurement of television broadcast signals of Grade B intensity for purposes of the Satellite Home Viewer Act (the "SHVA").<sup>2/</sup> Each of the Associations is chartered to help create and maintain a regulatory and economic environment conducive to the growth of the free, over-the-air, locally based, full service radio and television broadcast industries in their respective states. As such, the Associations have a direct interest in this matter since their memberships include entities providing local television broadcast service to their communities that will be jeopardized if the proposals of EchoStar Communications Corporation ("EchoStar") and the National Rural Telecommunications

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<sup>1/</sup> Satellite Delivery of Network Signals to Unserved Households for Purposes of the Satellite Home Viewer Act, Notice of Proposed Rule Making, ("NPRM"), CS Docket No. 98-201, RM No. 9335, RM No. 9345, FCC 98-302 (November 17, 1998).

<sup>2/</sup> 17 U.S.C. § 119 (1998).

Cooperative (the “NRTC”) are adopted. Therefore, the Associations have the requisite interest to participate in this important proceeding.

2. The Associations appreciate the FCC’s genuine, and wholly appropriate, desire to play a constructive role under the SHVA. However, the SHVA is a copyright statute that is neither a part of the Communications Act of 1934, as amended,<sup>3</sup> nor otherwise under the Commission’s jurisdiction. For the reasons set forth below, the Associations believe that the Commission is foreclosed, as a matter of law, from adopting any of the proposals advanced by EchoStar and the NRTC. First, the FCC is barred from taking any action that would constitute a defacto amendment of a federal statute such as the SHVA or that frustrates the objectives or enforcement of such statute.<sup>4</sup> Second, even if the FCC had the legal authority to act in these circumstances, the Associations submit that such action would constitute an abuse of discretion.

## II. DISCUSSION

3. The FCC is being asked by EchoStar and the NRTC to essentially alter a key element in a Congressionally crafted mechanism, the “SHVA,” that balances the need to protect the intellectual property rights of the networks and their affiliates, on the one hand, and the need to assure the availability of network signals to unserved households, on the other hand. What is at stake under SHVA is the continued ability of the networks and their affiliates to provide high quality, free, over-the-air, local broadcast service throughout the nation. By seeking to involve the FCC in this federal legislative issue, EchoStar and the NRTC have raised the stakes even higher. Not only does the FCC, by inserting itself into the SHVA, risk jeopardizing those

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<sup>3/</sup> 47 U.S.C. §§ 151 et seq (1998).

<sup>4/</sup> Southwestern Bell Corporation, et al., v. FCC, 43 F3d 1515 (D.C. Cir. 1995) (“[U]ntil Congress changes the statute, the agency and the courts must abide by it.”).

intellectual property rights and localism as a by-product, it also risks undermining Congressional and judicial authority.

**A. The Commission Lacks Authority to Revise the Grade B Intensity Rule for Purposes of the SHVA**

4. Appropriately, the Commission has asked whether it has the authority to change the definition or measurement of “grade B intensity” with respect to SHVA.<sup>5</sup> The answer to this question is an unqualified “no.” EchoStar and the NRTC have asked the FCC to substitute a predicted Grade B signal for “actual site signal measurement” which is the legal standard used by the Congress in fashioning the SHVA. The Commission has no authority to tamper with this methodology. EchoStar and the NRTC would have the FCC create legal presumptions about the presence or absence of Grade B signals based on Longley-Rice or other predictive models and even change the db/U levels required for a Grade B signal. Likewise, the FCC lacks the authority to make these changes.

5. As mentioned, when Congress passed SHVA in 1988, it sought to preserve localism in free, broadcast television and ensure the vitality of local, free, over-the-air television stations, while carefully balancing the needs of households living in unserved areas.<sup>6</sup> The clever and self-serving proposals advanced by EchoStar and the NRTC would in effect strike a different balance than the one struck by the Congress. Specifically, by manipulating the definition and

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<sup>5</sup>/ NPRM at 10-12.

<sup>6</sup>/ H.R. Rep. No. 100-887, pt.2, at 26 (1988). (“Free local over-the-air television stations continue to play an important role in providing the American people information and entertainment. The Committee is concerned that changes in technology, and accompanying changes in law and regulation, do not undermine the base of free local television service upon which the American people have come to rely.”); H.R. Rep. No. 103-703, at 5 (1994) (One purpose of Act was to ensure that “households that cannot receive over-the-air broadcasts or cable can be supplied with television programming via home satellite dishes.”)

measurement of “Grade B intensity,” and corresponding burdens of proof, the area of homes deemed to be “unserved” for purposes of the SHVA would be enlarged and, as a consequence, the rights of the copyright holders would be further curtailed. Clearly the FCC has no power to amend this federal statute or to frustrate the objectives of such statute. It serves little purpose to parse through the technical arguments about Congressional intent where, as here, the adverse amendatory effect of the proposed changes on the statute itself is so clear.

**B. A Change of the Rule Would Undermine Congressional and Judicial Authority**

6. Through the SHVA, the Congress has spoken on the question: what is the proper balance between protecting the rights of copyright holders and the localism that such holders guarantee, and insuring the availability of network signals to households. To grant the relief sought by EchoStar and the NRTC would make a nullity of Congress’ own law and cast doubt on the efficacy of actions taken by the Congress, actions that have been exclusively delegated to the Congress. Moreover, the Commission risks interfering with the process of future legislation. The SHVA has been and continues to be the subject of efforts in the Congress to strengthen the statute and to weaken it.<sup>7/</sup> The statute is up for reauthorization. The matter is the subject of vigorous debate and careful consideration on Capitol Hill.<sup>8/</sup> While the Commission’s advice on issues uniquely within its expertise may be sought, rulemaking action by the Commission in these circumstances creates the risk that the existing law, which was an act of Congress, will be jeopardized and the legislative process undermined. That is a danger that the FCC must avoid as a matter of law and comity.

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<sup>7/</sup> S. 2494, 105th Cong. § 5(c) (1998); H.R. 4675, 105th Cong., title I, § 103(c) (1998).

<sup>8/</sup> See, e.g. 144 Cong. Rec. 21, S. 1449 (March 5, 1998).

7. To accept EchoStar's and the NRTC's proposals will also undermine judicial authority. The Courts are in the process of enforcing the SHVA.<sup>2</sup> EchoStar and the NRTC are asking the FCC to take action that would be used to defend their industry in such suits. Once again, the Congress, not the FCC, should decide whether the statute should be changed. By advancing the proposals in this proceeding, the Commission is allowing itself to be used as a shield by present and future defendants in judicial proceedings that are based on laws made by the Congress, not by the FCC. This action risks setting a very bad precedent for the enforcement of federal statutes in all fields. Once again, this is a danger that the FCC obviously should avoid.

### III. CONCLUSION

Based on the foregoing, the Associations respectfully urge the Commission to reject the proposals of EchoStar and the NRTC advanced in this proceeding.

Respectfully submitted,

Alabama Broadcasters Association  
Arizona Broadcasters Association  
California Broadcasters Association  
Connecticut Broadcasters Association  
Florida Association of Broadcasters  
Georgia Association of Broadcasters  
Idaho State Broadcasters Association  
Illinois Broadcasters Association  
Indiana Broadcasters Association  
Iowa Broadcasters Association  
Kansas Association of Broadcasters  
Kentucky Broadcasters Association  
Louisiana Association of Broadcasters  
Maine Association of Broadcasters  
Maryland/DC/Delaware Broadcasters  
Association  
Massachusetts Broadcasters Association  
Michigan Association of Broadcasters  
Minnesota Broadcasters Association  
Mississippi Association of Broadcasters  
Missouri Broadcasters Association

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<sup>2/</sup> See, e.g., CBS, Inc. Et al v. Prime Time 24, 9 F. Supp. 2d 1333 (S.D. FL., May 13, 1998); ABC, Inc. v. Prime Time 24, 17 F. Supp. 2d 467 (M.D.N.C., July 16, 1998)

Montana Broadcasters Association  
Nebraska Broadcasters Association  
Nevada Broadcasters Association  
New Hampshire Association of Broadcasters  
New York State Broadcasters Association  
North Dakota Broadcasters Association  
Ohio Association of Broadcasters  
Oklahoma Association of Broadcasters  
Oregon Association of Broadcasters  
Pennsylvania Association of Broadcasters  
South Carolina Broadcasters Association  
South Dakota Broadcasters Association  
Tennessee Association of Broadcasters  
Texas Association of Broadcasters  
Utah Broadcasters Association  
Vermont Association of Broadcasters  
Washington State Association of Broadcasters  
Wisconsin Broadcasters Association  
Wyoming Association of Broadcasters

By: .

Richard R. Zaragoza  
David K. McGraw

Their Attorneys

Fisher Wayland Cooper Leader  
& Zaragoza L.L.P.  
2001 Pennsylvania Avenue, N.W.  
Suite 400  
Washington, D.C. 20006-1851  
(202) 659-3494

December 11, 1998



**CERTIFICATE OF SERVICE**

I, Susan R. Fisenne, do hereby certify that this 11th day of December, 1998, copies of the foregoing "**Joint Comments of the Named State Broadcasters Associations**" were sent to the following:

\* The Honorable William E. Kennard  
Chairman  
Federal Communications Commission  
1919 M Street, N.W., Room 814  
Washington, D.C. 20554

\* Commissioner Susan P. Ness  
Federal Communications Commission  
1919 M Street, N.W., Room 832  
Washington, D.C. 20554

\* Commissioner Harold Furchgott-Roth  
Federal Communications Commission  
1919 M Street, N.W., Room 802  
Washington, D.C. 20554

\* Commissioner Michael K. Powell  
Federal Communications Commission  
1919 M Street, N.W., Room 844  
Washington, D.C. 20554

\* Commissioner Gloria Tristani  
Federal Communications Commission  
1919 M Street, N.W., Room 826  
Washington, D.C. 20554

\* Deborah A. Lathen, Esquire  
Chief  
Cable Services Bureau  
Federal Communications Commission  
2033 M Street, N.W., Room 918  
Washington, D.C. 20554

\* Mr. Richard M. Smith  
Chief, Office of Engineering and Technology  
Federal Communications Commission  
2033 M Street, N.W.  
Washington, D.C. 20554

**\* VIA HAND DELIVERY**

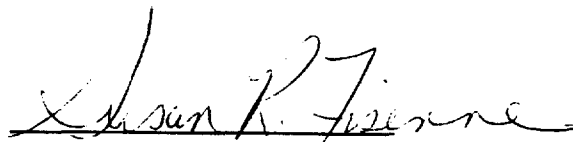
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David K. Moskowitz, Esquire  
Senior Vice President and  
General Counsel  
EchoStar Communications Corporation  
5701 South Santa Fe  
Littleton, Colorado 80120  
Counsel for EchoStar Communications  
Corp.

Philip L. Malet, Esquire  
Pantelis Michalopoulos, Esquire  
Michael D. Nilson, Esquire  
Steptoe & Johnson LLP  
1330 Connecticut Avenue, N.W.  
Washington, D.C. 20036  
Counsel for EchoStar Communications  
Corp.

Steven T. Berman, Esquire  
National Rural Telecommunications  
Cooperative  
2201 Cooperative Way, Suite 400  
Woodland Park  
Herndon, Virginia 20171  
Counsel for National Rural  
Telecommunications Cooperative

Jack Richards, Esquire  
Paula Deza, Esquire  
Nicole Donath, Esquire  
Keller and Heckman LLP  
1001 G Street, N.W. 500 West  
Washington, D.C. 20001  
Counsel for National Rural  
Telecommunications Cooperative

  
Susan R. Fisenne